No. 86 1713

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES CAPORALE, ALFRED PILOTTO, BERNARD RUBIN, GEORGE WUAGNEUX, SALVATORE TRICARIO, LOUIS C. OSTRER and JOHN GIARDIELLO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether ethnic taunts and anti-Italian comments, directed toward defendants during jury deliberations, deprived defendants of a fair trial?

2. Whether comments by jurors, during deliberations, that defendants looked like "Mafia, criminals" or "underworld" characters indicated a predisposition toward guilt, or constituted prejudicial "extra-judicial contact" which deprived defendants of a fair trial?

3. Whether under Section 1963(a) of Title 18 of the United States Code, the Fifth Amendment, the Eighth Amendment, and Article III of the United States Constitution, a person may be held jointly and severally liable for a forfeiture of 1.25 million dollars where (i) he has been convicted of no substantive offense under Section 1962 but only a conspiracy offense; and (ii) the government has failed to show how much, if any, of that money he received?

4. Whether petitioners Pilotto, Tricario and Rubin were denied the right to trial by jury on the forfeiture count of the indictment, where the Court expressly represented that in return for waiver of trial by jury it would not entertain a joint and several liability theory and the Court thereafter entered forfeitures of nearly $600,000 and $1,255,000 based upon a theory of joint and several liability?

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Petitioners, JAMES CAPORALE, ALFRED PILOTTO, BERNARD RUBIN, GEORGE WUAGNEUX, SALVATORE TRICARIO, LOUIS C. OSTRER and JOHN GIARDIELLO, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-titled proceeding on December 31, 1986. A petition for rehearing with suggestion for en banc consideration was denied on February 24, 1987.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Eleventh Circuit is reported at 806 F.2d 1487 (11th Cir. 1986). The order denying a timely petition for rehearing and rehearing en banc is reprinted in the Appendix hereto at pages 1-4 respectively.

Memoranda and orders of the Court of Appeals remanding the case for hearing on jury tampering are reprinted in the Appendix at pages 5-6.

The order of the United States District Court for the Southern District of Florida (Kehoe J.) denying a new trial and imposing forfeitures have not been reported. They are reprinted in the Appendix at pages 7-20.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 31, 1986 and a timely petition for rehearing, with a suggestion for rehearing en banc, was denied on February 24, 1987.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides in relevant part:

> "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Fifth Amendment provides in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The relevant portions of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1963 *et seq.* appear in the Appendix at page 21.

STATEMENT OF THE CASE

This case involves the questions whether petitioners received a fair trial by an impartial jury when the jurors had developed preconceived notions of guilt based upon ethnic stereotypes, and whether, in a case of first impression, RICO forfeitures may be entered jointly and severally on a conspiracy theory alone.

The Government brought a one count indictment charging sixteen defendants with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. 1962(d). No substantive violation of the statute was charged. Five of the defendants were severed prior to trial and are not petitioners here; they are awaiting trial.

Of the remaining eleven defendants, six have Italian surnames and three were from the Chicagoland area. On June 29, 1982, the jury returned its final verdict in the case. Three defendants were acquitted. The eight petitioners herein were convicted in the United States District Court for the Southern District of Florida in case No. 81-00230 Cr. Of that group four are Italian Americans and two are from the Chicago Metropolitan area.

Forfeitures totalling $1,254,964.80 were entered jointly and severally against petitioners Gopman, Tricario, Giardiello, and Rubin. Pilotto was ordered to forfeit $595,701.90 which was received not by him but by his son-in-law, James Pinkard, a severed defendant yet awaiting trial. Petitioners did not receive a jury trial on the forfeitures totalling 1.8 million dollars.

Defendants moved for a new trial based on reports of jury tampering and requested a hearing on that issue. The trial court denied these applications.

All eight defendants appealed and full briefs were filed in the Eleventh Circuit by each defendant in case 82-5964. The Eleventh Circuit on March 14, 1984 remanded the case to the district court for the limited purpose of conducting an evidentiary hearing on the jury tampering issue.

The record of the proceeding on remand is replete with incidents which destroyed the possibility of impartial jury deliberations.

One juror frequently commented to his fellow jurors during the deliberation that everyone was associated with organized crime (Tr. 10/1/84, p. 112), that he himself was linked to the underworld, and that he was receiving telephone calls from Chicago, thereby presenting extrinsic evidence to the jury. The juror's testimony indicated that such comments were made in response to insidious, ethnic taunts and remarks that demonstrated the prejudice of fellow jurors as set forth in the transcript of proceedings of September 7, 1984, where juror Curtice stated:

> "Some of the jurors, not all, but couple, used to bug me because I was Italian." (p. 81)
>
> "There is two or three other people in there kind of pushing the fact I was Italian and was sympathetic. (p. 84) I might have said I belong to the underworld and I go out and shoot people." (p. 85)

From the beginning Curtice was accused by his fellow jurors, "You must be one of them" (9/7/84, p. 90), and the jurors felt, "That I [Curtice] was Italian, I have to be a crook and I have to be Mafia." (p. 91) Curtice felt these jurors had "like a resentment", (p. 92) toward him

and testified, ". . . it was pushed at me . . . Maybe I am a crook and stuff like this because I am Italian." (p. 94)

The jurors remarked about defendants' appearance:

"That looks like a criminal" (p. 87);

"That one looks like a typical underworld" (p. 88); and

"Well, they must all be Mafia." (p. 89)

Page 87 of the 9/27/84 transcript indicates that all the slurs were made after closing arguments and after the Judge instructed the jury. At page 88 Curtice was asked:

> Zeidwig: Q. "These comments you made to the jurors during deliberations during that period of time about having received or making phone calls, were any of those statements made during the trial itself?"
> Curtice: A. "No."
> Zeidwig: Q. "It was strictly during deliberations?"
> Curtice: A. "Yes."

Curtice had told his fellow jurors that some defendants had to be sacrificed to save others:

> Q. "Did you ever hear Mr. Curtice make some statement to the effect that he was toid that certain defendants would have to be sacrificed so that others could be acquitted?"
> A. "Yes."
> Q. "When did he make that statement?"
> A. "Probably near the end of the trial." (Tr. 9/7/84, p. 104).

There was no indication that the statement was made in jest or at a lunch break.

The jury harbored a preconceived notion that all defendants were Mafia members:

Q. "Was there any reference to all of these defendants who were probably members of the Mafia?"
A. "Probably somehow connected, yes."
Q. "Was that from Mr. Curtice?"
A. "No. Not especially." Swanko pp. 108-109 (Tr. 9/7/84).

Swanko at p. 109 (Tr. 9/7/84) states further "that members of the jury panel other than Curtice indicated that defendants were members of organized crime or the Mafia."

The trial court recognized various remarks to be "inappropriate," but stated they were "perceived for the most part by the other jurors in jest" and denied a new trial. A joint appeal of the issue on behalf of all defendants followed in case 85-5670.

The Court of Appeals acknowledged that jurors had made inappropriate comments, directed at both the defendants and an Italian juror, Curtice, linking Italians to the Mafia, which provoked Curtice to state "jokingly" that he had "Mafia connections," but held there was no prejudgment of guilt as a result of ethnic bias; 806 F.2d at 1504-1505. This conclusion was based, in part, on the notion that the inappropriate remarks occurred at lunch or breaks, though the record (p. 87 of the 9/27/84 transcript) indicated the slurs were made strictly during deliberations. *Id.* at 1505.

The opinion below recognizes that the imposition of joint and several liability for RICO forfeitures creates an issue of first impression (806 F.2d at 1506) and the Government conceded at oral argument that it had never brought a RICO forfeiture action based solely on conspiracy without charging a substantive RICO offense.

REASONS FOR GRANTING THE WRIT

I.

JURORS' ETHNIC BIAS INDICATED A PREDISPOSITION TOWARD GUILT, DEPRIVING DEFENDANTS OF AN IMPARTIAL JURY.

Recognizing the necessity of protecting jury deliberations from the pernicious effects of either ethnic bias or extrinsic contacts, this Court has held that:

> "Any private communication, contact or tampering directly or indirectly about a matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial if not made pursuant to known rules of court . . . with full knowledge of parties." *Remmer v. United States*, 347 U.S. 227-229 (1954).

The decision below distorts beyond recognition this fundamental precept of due process, holding, in effect, that ethnic bias can be ignored if demonstrated in a "joking" manner and that such bias, epitomized by statements that defendants "must all be Mafia" (Tr. 9/7/84, p. 89), does not constitute extrinsic contact or juror misconduct requiring a new trial. To correct this miscarriage of justice, this Court must grant review and reverse, reaffirming the principle that every defendant is entitled to be judged solely on the basis of facts presented at trial and not convicted as a result of jurors' ethnic bias and preconceptions; *Remmer, supra*; *Irvin v. Dowd*, 366 U.S. 717 (1961).

The court below acknowledged that various jurors commented upon defendants' appearance and Italian surnames, characterizing them as part of the criminal underworld, but then dismissed such statements as "jokes"; 806 F.2d at 1503. Yet had they been made outside a courtroom, these defamatory comments would be slanderous

per se; *Antonelli v. Field Enterprises*, 115 Ill. App. 3d 432, 450 N.E.2d 876 (1983) ("mobster"); *Privitera v. Town of Phelps*, 435 N.Y.S.2d 402, 79 A.2d 1 (1981) ("criminal" and "membership in Mafia"); *O'Leary v. Hearst Magazine*, 4 N.Y.S.2d 79, 167 Misc. 481 (1981) ("an associate of characters of the underworld" was found to be defamatory.)

Such stereotypes projected upon Italian Americans are ethnic slurs and require a new trial because they were directed at both the defendants and one of the jurors, Curtice, provoking him to refer to himself as a gangster and to suggest contact from an underworld relative in Chicago regarding the jury's deliberations. Four of the defendants, James Caporale, Alfred Pilotto, Salvatore Tricario, and John Giardiello have Italian surnames and were subjected to the jury's "you are one of them" Mafia-mentality. Moreover, Caporale and Pilotto reside in the Chicago, Illinois area which was perceived by the jurors as teeming with Italian gangsters, *i.e.*, Al Capone.

The jurors' hostility was not confined to the Italian defendants; it was also directed at a fellow juror, who responded, inappropriately but understandably, by speaking of Mafia connections and directions from an underworld Chicago relative to "sacrifice" some defendants in order to acquit others. (Tr. 9/7/84, p. 107) Indeed, the jury shunned and taunted juror Curtice, stating, "You must be one of them (Mafia)," revealing a predisposition to convict the defendants because of their ethnic background, and shaming and provoking a fellow juror into improper conduct. Under such conditions, any possibility of an impartial verdict was destroyed.

II.

THE JURORS' COMMENTS LINKING ITALIANS TO THE MAFIA, EVEN IF MADE IN JEST, WERE INHERENTLY PREJUDICIAL, AND DEPRIVED DEFENDANTS OF A FAIR TRIAL.

Ignoring both this Court's repeated admonitions[1] and its own recent decision in *United States v. Heller*, 785

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[1] *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961), in which the Court stated:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682; *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station life which he occupies."

Justice Marshall, summarizing numerous decisions of this Court, including *Irvin, supra, Turner v. Louisiana*, 379 U.S. 466 (1965), *Ham v. South Carolina*, 409 U.S. 524 (1973), *Peters v. Kiff*, 407 U.S. 505 (1972), and *Remmer, supra*, has accurately articulated the prophylactic rules developed to minimize the danger of juror bias:

> "To summarize, the Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased; has regarded the absence of a balanced perspective, and not simply the existence of bias against defendant, as a cognizable form of prejudice; has not always required a particularized showing of prejudice; and has strongly presumed that contact with a juror initiated by a third party is prejudicial. *Smith v. Phillips*, 455 U.S. 224, 228 (1982) (Marshall, J., dissenting).

Indeed, this Court recently reaffirmed the necessity of prophylactic rules to prevent juror bias, holding that Blacks may not be excluded arbitrarily from juries by discriminatory use of peremptory challenges by the prosecution. *Batson v. Kentucky*, ___ U.S. ___, 106 S.Ct. 1712 (1986).

F.2d 1524 (11th Cir. 1986), the court below held that the jurors' comments about Italians and the Mafia were "jokes," and did not constitute a prejudgment of guilt; 806 F.2d at 1505. Given the inflammatory and inherently prejudicial nature of the jurors' comments, however, this conclusion cannot be allowed to stand.

In *Heller, supra,* the Court reversed the conviction of a Jewish accountant/attorney for income tax evasion, based on anti-Semitic jokes and comments made by various jurors. Properly rejecting the argument that the comments were "harmless" because made in a joking manner, the Court held:

> " '[Humor]' is by its very nature an expression of prejudice on the part of the maker . . . those who made the jokes at trial and those who reacted to them with 'gales of laughter' displayed the sort of bigotry that clearly denied the defendant, Heller, the fair and impartial jury that the Constitution mandates;" 785 F.2d at 1527.

Nor are jurors' denials that their expressions of ethnic bigotry affected their verdict sufficient to insure that defendants received the fair trial guaranteed by the Fifth and Sixth Amendments. As stated by Justice Brennan in *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 558 (1983), "the bias of a juror will rarely be admitted by the juror himself . . . partly because the juror is unaware of it." Adhering to this principle, the Eleventh Circuit itself has affirmed that, "Binding precedent in this Circuit holds that a juror's denials of misconduct are an insufficient basis on which to reject a claim of misconduct." *United States v. Brantley,* 733 F.2d 1429, 1440 (11th Cir. 1984). Accord, *United States v. Heller, supra,* at 1527, n. 1. The *Heller* court was explicit in recognizing the reasons for and necessity of granting a new trial

when juror bias is manifested by negative ethnic stereotypes, even when the jurors deny that their verdict was affected:

> "The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which despite his protestation to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires. The religious prejudice displayed by the jurors in the case presently before us is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible harmful effects on this appellant.
>
> * * *
>
> It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism;" 785 F.2d at 1527 (fn. omitted).

The Court's abandonment of these principles in its opinion below is incomprehensible, especially in light of the nature of the bias manifested. While *Heller* may not have established a *per se* rule, requiring a new trial whenever ethnic stereotypes are expressed during jury deliberations, this Court's decisions protecting the jury from extrinsic influences and enforcing the Constitutional guarantees of trial by an unbiased jury require that a new trial be granted whenever expressions of such stereotypes relate directly to the guilt or innocence of the accused; e.g., *Ham v. South Carolina*, 409 U.S. 524 (1973) (*voir dire* inquiry into possibility of racial bias required); *Turner v. Louisiana*, 379 U.S. 466 (1965) (presence of key prosecution witnesses with jurors during deliberations tainted the jury's ver-

dict, in spite of witnesses' denials that they discussed the case with the jury); *Irvin v. Dowd*, 366 U.S. 717 (1961) (new trial required where, although jurors professed capability of rendering a fair verdict, eight of them admitted to preconceptions of guilt based on extensive pre-trial publicity); *Remmer v. United States*, 347 U.S. 227 (1954) (any extra-judicial contact with the jury is presumptively prejudicial); Cf., *Batson v. Kentucky*, ____ U.S. ____, 106 S.Ct. 1712 (1986) (prophylactic procedures adopted to prevent use of peremptory challenges to exclude racial groups from the jury).

The record in this case affords a rare glimpse into actual jury deliberations, and reveals a shocking display of ethnic bias relating directly to the guilt of the defendants. Certainly, no comments could be more inflammatory or prejudicial than those uttered by jurors in this case, stating that, based on their obviously Italian appearance, defendants were associated with the Mafia or criminal underworld. Especially in a RICO[2] case, in which association with a criminal enterprise is an element of the crime, jurors' preconceived notions of membership in the Mafia, based on defendants' ethnic background, preclude any possibility of a fair trial or unbiased verdict. Ethnic prejudice is always a serious matter; but, in this case, the jury's notion of an ethnic predisposition to criminality goes to the very crux of the defendants' right to receive a fair trial. Thus, if *Heller*, *supra*, and this Court's repeated admonitions that defendants are entitled to a

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[2] It is worth noting that this acronyon itself suggests anti-Italian bias. Taken from the Edward G. Robinson gangster film *Little Caesar*, the name is Italian and connotes Mafia or organized crime images. Robinson, in the leading role, played the thinly disguised Chicago mobster Al Capone, and was named RICO. See *Parnes v. Heinold Commodities*, 548 F. Supp. 20 (N.D. Ill. 1982).

trial by unbiased jurors have any meaning, they require this Court to grant the petition and reverse the decision below.

III.

ETHNIC REMARKS CONSTITUTE EXTRINSIC CONTACT.

An ethnic joke or taunt harbors an extrinsic prejudice which constitutes impermissible contact, every bit as damaging as bringing a newspaper article into the jury room, or an impermissible conversation, and is prejudicial. There is no doubt that rampant anti-Italian remarks relating to the Mafia and the underworld were made in the presence of other jurors during the course of deliberations and that these statements made other jurors uncomfortable. (Tr. p. 105, 9/7/84) These extrinsic remarks were presumptively prejudicial unless rebutted, as would be any extra-judicial contact. *Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Phillips*, 644 F.2d 999 (5th Cir. 1981); *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979).

The Government has failed to meet its burden of demonstrating that the consideration of the extrinsic evidence and juror bias was harmless. *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984). As in *Perkins*, introduction of such comments into the jury's deliberations warrants a new trial.

United States v. Brantley, 733 F.2d 1429, 1441 (11th Cir. 1984), holds that if the conduct posed "a reasonable possibility" of prejudice the conviction must be reversed and a new trial ordered. The statements made during the course of deliberations here pose more than the possibility of prejudice. There is actual prejudice when jurors recall remarks about calls from "cousins in Chicago" made every

day to "check on the progress of the case" and that some defendants "would have to be sacrificed for others." It is likely that if someone had to be "sacrificed," as Curtice stated, it would be one of the Chicago defendants. Thus, it was clearly erroneous to find no possibility of prejudice by the remarks when a juror testified she believed these statements. (Swanko, p. 107, Tr. 9/7/84)

A jury in a criminal case must reach a verdict based upon the evidence presented at trial; *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965). Accordingly, any communication with a juror during trial about a matter pending before the jury is deemed presumptively prejudicial to defendants' right to a fair trial; *United States v. Sublet*, 644 F.2d 737, 746 (8th Cir. 1981). These negative ethnic remarks were such outside contact, as they posed more than a reasonable possibility of prejudice to petitioners. Accordingly, prejudice is assumed and the Government bears the burden of demonstrating that the extrinsic comments were harmless, *Remmer v. United States*, 347 U.S. 277, 299 (1954); *Perkins, supra.* The Government never met this burden. Accordingly, a new trial is required.

IV.

THE DECISION BELOW FUNDAMENTALLY MISCONSTRUES THE FORFEITURE PROVISIONS OF THE RICO STATUTE, AND IT RAISES IMPORTANT QUESTIONS OF FIRST IMPRESSION UNDER THE STATUTE, THE FIFTH AMENDMENT, THE EIGHTH AMENDMENT, AND ARTICLE III OF THE UNITED STATES CONSTITUTION.

The trial court entered an order holding four of the defendants jointly and severally liable for a forfeiture of over 1.25 million dollars. *See* 806 F.2d at 1505-1509. Recognizing that the Govenment had failed to show how much, if any, of this money each individual defendant had re-

ceived, that forfeiture had never before been imposed for a violation of the conspiracy provision of Section 1962, and that forfeiture had never before been imposed on the basis of joint and several liability, the Eleventh Circuit Court of Appeals nonetheless affirmed the order. *See id.* The Court's decision, fundamentally misconstrues the forfeiture provisions of Section 1963, and raises important and novel questions under the statute, the Fifth Amendment, the Eighth Amendment, and Article III of the United States Constitution.

1. *The Statute*

a. Examination of the language used is, of course, the first step in construing a statutory provision. And where that language is "unambiguous," it must ordinarily be regarded as "conclusive." *United States v. Turkette*, 452 U.S. 576, 580 (1981). *See also* 2A *Sutherland Statutory Construction* § 46.01 (4th ed. 1985). The relevant statutory provision, 18 U.S.C. § 1963(a), provided in pertinent part (at the time of sentencing) as follows:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962 . . . .

Two aspects of the provision's language and structure unambiguously demonstrate, that a forfeiture may not be imposed on the basis of joint and several liability.

First, the provision requires that a person "forfeit" that which "he has acquired illegally." To "forfeit" something means, as the word is ordinarily used and understood, to surrender it. *See, e.g., The American Heritage Dictionary Of The English Language* 515 (1981). This element of sur-

render is reinforced by the statutory language "he has acquired." The instant order, however, effectively abandons these elements of acquisition and surrender. Under its terms a person may be compelled to "forfeit" that which he never acquired. The order, in effect, imposes not a forfeiture but a fine—one that is over fifty times the $25,000 maximum permitted by the statute.

Second, forfeiture is one of three criminal penalties that may be imposed under the provision upon "[w]hoever violates" Section 1962. The other two penalties are imprisonment and fine. The provision authorizes the imposition of these three penalties in parallel terms. Plainly, a term of imprisonment could not be imposed under the provision on the basis of joint and several liability. Just as plainly, a fine could not be so imposed. It is no less plain, that the language and structure of the provision do not support the imposition of a forfeiture on such a basis.

b. The instant forfeiture order was imposed for a violation of the conspiracy provision of the statute, Section 1962(d). As the government conceded in oral argument before the Court of Appeals, this was the first RICO case in which forfeiture had been sought for a conspiracy offense. And as the government further conceded, no substantive offense was charged here because problems were anticipated under the statute of limitations in proving such an offense. It is improper, to impose a forfeiture on the basis of a conspiracy conviction alone.

The penalty provision of the statute authorizes, as a punishment for violation of Section 1962, forfeiture of "any interest [the person] has acquired or maintained in violation of" the statute. It thus authorizes forfeiture of any "interest" that represents the product of the conduct for which the person was convicted. A conspiracy conviction, however, does not encompass any such conduct. That is

because the commission of acts constituting a pattern of racketeering activity is not an element of a RICO conspiracy offense. *See, e.g., United States v. Elliott*, 571 F.2d 880, 902-903 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978). Rather, the gist of the offense is an agreement to commit such acts. *Id.* Therefore, that conviction of a conspiracy offense alone may not form the predicate for a forfeiture under Section 1963.

This result is equally compelled by fundamental notions of fair play. It is fundamentally unfair, to allow the government to treat the offense as the inchoate offense of conspiracy for purposes of the trial—and thereby reap all of the attendant procedural advantages with respect to the statute of limitations, joinder, venue, the law of evidence, and the elements of the offense—and then to turn around at the time of sentencing and treat the offense as a completed one requiring forfeiture. The government should not be permitted to have it both ways.

c. Finally, imposition of a forfeiture on the basis of joint and several liability should be rejected because it does not rationally advance the purposes of the statute. The legislative purposes of RICO were the "removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains." 118 Cong. Rec. 592 (1970) (remarks of Senator McClellan). The purpose of the forfeiture provision was thus to compel the surrender of that which had been improperly acquired. As stated, however, the imposition of forfeiture on the basis of joint and several liability effectively nullifies the elements of individual acquisition and surrender. It thus removes any rational, ascertainable connection between any "ill-gotten gains" and the monies forfeited.

A simple hypothetical will serve to illustrate this. Consider convicted defendants A, B, and C, on whom a forfeiture of one million dollars has been imposed on the basis of joint and several liability. Defendant A received 90% of this money, but he has since declared bankruptcy. Defendant B received 7% of the money, but his assets are presently worth no more than $10,000. Defendant C received only 3% of the money, but he has otherwise amassed a considerable fortune through legitimate business dealings. The judgment can thus, as a practical matter, only be enforced against defendant C. The net result would be that a person who had received only $30,000 in "ill-gotten" gains would be compelled to "forfeit" one million dollars—or more than thirty times what he had improperly gained. Such a result would not rationally further the purpose of a provision designed only to reach "ill-gotten" gains. And while this hypothetical may appear extreme, any differences between it and other forfeitures imposed on this basis are ones of degree and not kind.

2. *The Fifth Amendment*

a. Due process requires that a statutory provision "not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). *See also, e.g., United States v. 1,497,081.78 in U.S. Currency*, 777 F.2d 1451, 1452 (11th Cir. 1985) (forfeiture provision of the Bank Secrecy Act, 31 U.S.C. § 1102, "bears a substantial relationship to the objective being sought" and thus does not contravene due process). As discussed in part 1, c *supra*, imposition of a forfeiture on the basis of joint and several liability does not rationally advance the purpose of the forfeiture provision of Section 1963(a)—the deprivation of "ill-gotten gains." A forfeiture imposed on this basis would reach

such gains, if at all, only in an arbitrary, haphazard, hit-and-miss fashion. Imposition of a forfeiture on this basis thus renders Section 1963(a) unconstitutional as applied.

b. Due process requires that each element of an offense be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). The "amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." Fed. R. Crim. P. 31, Advisory Committee Notes. The interest subject to forfeiture is that which "he [a convicted defendant] has acquired or maintained in violation of section 1962." 18 U.S.C. § 1963(a). The effect of imposing forfeiture on the basis of joint and several liability is, to permit the government to obtain forfeiture without proving an essential element of the offense—the amount of the interest improperly acquired by the individual defendant from whom forfeiture is sought. As such, the imposition of a forfeiture on this basis contravenes due process.

3. *The Eighth Amendment*

The Eighth Amendment prohibits "excessive fines" and "cruel and unusual punishments." The principles underlying this amendment are at least as old as the Magna Carta, "three chapters of [which] were devoted to the rule that 'amercements' [which were similar to modern-day fines] may not be excessive." *Solem v. Helm*, 436 U.S. 277, 284 (1983) (footnotes omitted). One of these principles is "proportionality"—the principle that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290. *See also, e.g., United States v. Huber*, 603 F.2d 387, 397 (2d Cir.) (RICO forfeiture does not contravene the Eighth Amendment as long as it "is at least in some rough way proportional to the crime"), *cert. denied*, 445 U.S. 927 (1979).

As discussed in part 1, a *supra*, the instant order effectively imposes not a forfeiture but a fine of up to over fifty times the $25,000 maximum permitted by Section 1963(a). Further, as discussed in part 1, c *supra*, the imposition of a forfeiture on the basis of joint and several liability leads to disproportionate results. Accordingly, the instant forfeiture order contravenes the Eighth Amendment.

4. *Article III*

The "judicial [p]ower" is vested in the federal courts under Article III. Assuming *arguendo* that the right to a jury trial was waived with respect to the forfeiture part of this case, *see* 806 F.2d at 1506, it was thereby committed to the trial court. In imposing forfeiture on the basis of joint and several liability, the trial court improperly delegated its judicial power to the executive branch in contravention of Article III.

Except in those few instances where a statute makes it the province of the jury, "punishment is exclusively the concern of the judge." 3 Wright, *Federal Practice And Procedure: Criminal 2d* § 512, at 10 (2d ed. 1982). *See also, e.g., United States v. Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973); *United States v. Davidson*, 367 F.2d 60, 63 (6th Cir. 1966); *Whitehead v. United States*, 155 F.2d 460, 462 (6th Cir. 1946). In imposing forfeiture on the basis of joint and several liability, however, the trial court effectively delegated to the executive branch the power to set the terms of this punishment. Under this order the Attorney General may, at his discretion, enforce the entire 1.25 million dollar judgment (or none of it) against any of these four defendants. The order is thus analogous to a judge's imposing a twenty-year term of imprisonment on the basis of joint and several liability, with it being

left to the Attorney General to determine how the sentence will be apportioned among the co-defendants.

It is true that Section 1963(c) and Rule 32(b)(2) of the Federal Rules of Criminal Procedure both direct the trial courts to authorize the Attorney General to seize property subject to forfeiture upon "such terms and conditions" as the court "shall deem proper." But that does not mean, that the trial court may delegate to the Attorney General the power to determine the amount of the forfeiture penalty that will be imposed upon a particular defendant. Rather, that language "encompasses the determination of such administrative details as the time and place that the property declared forfeited is to be seized by the Attorney General." *United States v. L'Hoste*, 609 F.2d 796, 811 (5th Cir. 1980). To grant the Attorney General the unqualified power to determine whether a particular defendant shall "forfeit" 1.25 million dollars, or nothing, or an amount that falls somewhere between these two extremes, is, we submit, to invest the executive branch with the very type of unbridled power that Article III was designed, in part, to guard against.

V.

PETITIONERS PILOTTO, TRICARIO AND RUBIN WERE DENIED THEIR SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY AS TO THE FORFEITURE COUNT.

Following trial on Count I of the indictment which alleged conspiracy to violate the RICO statute (18 U.S.C. §1962(d)), the Court inquired of certain defendants as to whether they wished a jury trial on the Forfeiture Count of the indictment (Count II). On the trial judge's express representation that the "theory of joint and several liability would not be argued or entertained" (R. 70:26), the petitioners PILOTTO, TRICARIO and RUBIN, amongst others,

agreed to waive jury trial on the forfeiture count of the indictment. The forfeiture count was tried to the Court on September 15, 1982, and submitted for ruling solely on the trial record and arguments of counsel (R. 13:3580). The Court thereafter entered personal forfeiture judgments based upon a theory of joint and several liability of almost $600,000 as to PILOTTO and $1,255,000 as to TRICARIO and RUBIN.

It has been repeatedly held that since forfeiture judgments pursuant to 18 U.S.C. 1963 are *in personam*, the defendant is entitled to a jury. (See *United States v. Long*, 654 F.2d 911, 915 (3rd Cir. 1981); *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984). As the above cited cases note, Federal Rules of Criminal Procedure 31(e) specifically provides for a special jury verdict.

In addition, since the forfeiture provisions in 18 U.S.C. 1963 are part of a criminal penalty imposed personally upon the defendant, it seems clear that the defendants' right to trial by jury is equally personal and can be given up only in strict compliance with Rule 23, Federal Rules of Criminal Procedure. A waiver must be knowingly, intelligently and voluntarily given. The waivers entered into in this case cannot be said to be knowingly and voluntarily made when they were conditioned upon the judge's specific representation that he would not entertain a theory of joint and several liability and he thereafter imposes forfeiture on these petitioners on that basis.

The decision of the Eleventh Circuit in this case is in direct conflict with its prior holding in *United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984), and the Third Circuit's holding in *United States v. Long*, 654 F.2d 911 (3rd Cir. 1981).

VI.

PETITIONER PILOTTO WAS DENIED HIS RIGHT TO A MEANINGFUL DIRECT APPEAL AND DUE PROCESS OF LAW WHERE THE COURT OF APPEALS BASED ITS OPINION ON INACCURATE STATEMENTS OF FACT.

The petitioner, PILOTTO additionally points out that as to him, the Eleventh Circuit opinion is factually incorrect where at footnote 24 of page 1066 of the opinion the Court suggests waiver by stating that Pilotto does not raise the issue. The statements of the Court are totally untrue, ignoring PILOTTO'S argument IV in his brief and his counsel's oral argument. The Eleventh Circuit's action thus denies Pilotto due process of law and a right to meaningful direct appeal.

CONCLUSION

This matter involves important issues of first impression for the Court:

1. Whether jurors' display of ethnic bias requires a new trial?
2. Whether acknowledged "inappropriate" juror conduct in the form of ethnic bias and predisposition as to criminality requires a new trial?
3. Whether entry of a forfeiture or the basis of joint and several liability based solely on a conspiracy conviction, is permitted by the RICO statute?
4. Whether petitioners were denied their right to a trial by jury on the RICO forfeiture issues?

For these reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 82-5964 — D.C. Docket No. 81-00230

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES CAPORALE, ALFRED PILOTTO,
SEYMOUR A. GOPMAN, BERNARD RUBIN,
GEORGE WUAGNEUX, SALVATORE TRICARIO,
LOUIS C. OSTRER, and JOHN GIARDIELLO,

Defendants-Appellants.

No. 85-5670 — D.C. Docket No. 81-00230

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SEYMOUR GOPMAN, SALVATORE TRICARIO,
GEORGE WUAGNEUX, LOUIS C. OSTRER,
JOHN GIARDIELLO, JAMES CAPORALE,
ALFRED PILOTTO and BERNARD RUBIN,

Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

Before FAY and JOHNSON, *Circuit Judges*, and HOFFMAN*, *Senior District Judge*.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of convictions of the said District Court in this cause be and the same are hereby, AFFIRMED.

---

* Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

Entered: December 31, 1986
For the Court: Miguel J. Cortez, Clerk
By: /s/ David J. Maland
Deputy Clerk

ISSUED AS MANDATE: MAR 17 1987

App. 3

[FILED FEBRUARY 24, 1987]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 82-5964, 85-5670

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES CAPORALE, ALFRED PILOTTO,
SEYMOUR A. GOPMAN, BERNARD RUBIN,
GEORGE WUAGNEUX, SALVATORE TRICARIO,
LOUIS C. OSTRER and JOHN GIARDIELLO,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SEYMOUR GOPMAN, SALVATORE TRICARIO,
GEORGE WUAGNEUX, LOUIS C. OSTRER,
JOHN GIARDIELLO, JAMES CAPORALE,
ALFRED PILOTTO and BERNARD RUBIN,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER

The petitions for rehearing having been DENIED and the court having been polled at the request of one of the members of the panel and none of the Judges in regular active service having voted in favor of a Rehearing En Banc, the Suggestion for Rehearing En Banc is DENIED.

The Motion of Defendant/Appellant Seymour A. Gopman requesting "access to the report and record of the investigating committee and all the Judicial Council of the Eleventh Circuit" having been considered by each member of the court in regular active service, the motion is DENIED.

The motions to which this order are directed having been sealed upon the motions of appellants, the Clerk is directed to seal this order.

Entered for the Court this the 24th day of February, 1987.

/s/ Paul H Roney
Chief Judge

APPENDIX B

[FILED MARCH 14, 1984]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5964

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES CAPORALE, ALFRED PILOTTO,
SEYMOUR A. GOPMAN, BERNARD RUBIN,
GEORGE WUAGNEUX, SALVATORE TRICARIO,
LOUIS C. OSTRER and JOHN GIARDIELLO,

Defendants-Appellants.

Appeal from the United States District
Court for the Southern District of Florida

Before GODBOLD, *Chief Judge,* HILL and THORNBERRY*, *Circuit Judges.*

* Honorable Homer Thornberry, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

BY THE COURT:

Appellants seek a remand of this case to the district court for it to consider the issue of alleged tampering with the jury. The government states that it does not oppose a remand.

It is, therefore, ORDERED that the assignment of this case to the oral argument calendar is VACATED and the case is REMANDED to the district court for further proceedings relating to the jury tampering issue.

APPENDIX C

[FILED AUGUST 8, 1985]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-280-CR-KEHOE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY ACCARDO, et al.,

Defendants.

ORDER DENYING MOTION FOR NEW TRIAL

THIS CAUSE is before the Court upon the Defendants' Motion for New Trial on the ground of alleged jury tampering, i.e., the alleged bribery of one of the jurors. At the request of the parties, the Court has conducted numerous hearings during which eleven of the twelve jurors[1] who rendered verdicts in the case as well as the six alternate jurors in addition to other witnesses called by the parties testified. Moreover, the F.B.I. and grand jury investigations with regards to this jury tampering issue were made part of the record. At the conclusion of the hearings, the parties at the request of the Court filed memoranda of law in support of their respective positions.

In order to prevail on this motion, Defendants must demonstrate by a preponderance of credible evidence that

[1] A deposition of the twelfth juror was taken, but was neither relied upon nor made part of the record by the Defendants.

extrinsic factual matter tainted the jury's deliberations. *U.S. v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979); *U.S. v. Perkins*, 748 F.2d 1519 (11th Cir. 1984). The Court has carefully listened to the testimony of the witnesses and the arguments of counsel and reviewed the memoranda of law of the respective parties and finds that there is no tangible evidence to support the allegation that a juror was bribed or such an attempt was made. To date, the bribery allegation amounts to nothing more than a rumor with no basis in fact. Thus, the Court concludes that Defendants have failed to meet their burden of proving "prejudicial factual intrusion." With respect to the few inappropriate remarks made by one of the jurors, it is clear from the testimony that these remarks were perceived for the most part by the other jurors as having been made in jest. More important, it is equally clear from their testimony that these remarks had absolutely no influence upon the jurors in their deliberations.

Accordingly, it is

ORDERED AND ADJUDGED that the motion for new trial of all Defendants is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 8th day of August, 1985.

/s/ James W. Kehoe
United States District Judge

copies furnished to:

Carl M. Walsh, Esq.
John M. Owens, Esq.
Thomas Decker, Esq.
Robyn Hermann, Esq.
Clifford B. Hark, Esq.
Victor Ciardelli, Esq.
Ronald A. Dion, Esq.
Barry Fallick, Esq.

APPENDIX D

[DATED DECEMBER 23, 1982]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-230-Cr-JWK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES CAPORALE, et al.,

Defendants.

(Defendants Gopman,
Giardiello, Pilotto,
Tricario, and Rubin)

ORDER AND JUDGMENT OF MONEY FORFEITURE RELATING TO DEFENDANTS GIARDIELLO, RUBIN, GOPMAN, TRICARIO, AND PILOTTO

Upon a jury verdict of guilty as to Count One of the indictment in this case, charging a conspiracy to violate the provisions of Title 18, United States Code, Section 1962(d), returned against the defendants Giardiello, Rubin, Gopman, Tricario, and Pilotto, the Court entered judgment of conviction on September 14, 1982. With the consent of the government, the defendants waived jury trial

on the forfeiture portion of the indictment and the forfeiture was tried to the Court on September 15, 1982. The forfeiture was submitted to the Court solely on the trial record and arguments of counsel. This order addresses the portions of the forfeiture pertaining to the proceeds of the illegal activities of which the defendants were convicted.

I. *Findings of Fact*

Pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure, the Court makes the following findings of fact, based on the evidence presented at the trial of this case and the arguments of counsel at the post-trial hearing on the forfeiture issue.

1. Consultants and Administrators, Inc. of Chicago, Illinois, was a corporation that provided dental, vision, and other medical services to members of the Laborers Union through an employee welfare benefit plan known as the Chicago Dental Plan.

2. Between 1974 and 1977, defendant Alfred Pilotto was the president of Local Union 5 of the Laborers Union, as well as vice-president of the Laborers Chicago District Council and a trustee of the Chicago Dental Plan.

3. During the same period, Consultants and Administrators made illegal kickback payments to a company known as Pinckard and Associates. Pinckard and Associates was operated by James Pinckard, the son-in-law of defendant Pilotto. Pinckard and Associates was designed to serve, and did serve, as a conduit through which Consultants and Administrators could make disguised kickback payments to defendant Pilotto.

4. The kickback payments were made pursuant to a scheme arranged by defendant Pilotto, under which Consultants and Administrators would obtain the optical and dental business of The Chicago Dental Plan in exchange for paying 10 percent of the gross premiums received to Pilotto through his son-in-law's corporation.

5. Pursuant to this arrangement, Consultants and Administrators in fact made kickback payments to Pinckard and Associates for several years in order to secure defendant Pilotto's support in obtaining the Chicago Dental Plan account for Consultants and Administrators.

6. The amounts of the kickback payments from Consultants and Administrators to Pinckard and Associates between 1974 and 1977 were as follows: $55,970.50 in 1974; $184,566.25 in 1975; $194,913.90 in 1976; and $160,251.25 in 1977. Thus, the total sum of the payments during the period 1974-77 was $595,701.90.

7. The payments to Pinckard and Associates were all intended for the use and benefit of defendant Pilotto, and the payments in fact all were paid to Pinckard and Associates on behalf of defendant Pilotto and at his direction.

8. Dental and Vision Care Centers, Inc. of Miami, Florida, (DVCC) was a corporation associated with Consultants and Administrators, which provided dental, vision, and other medical services to members of the Laborers Union through an employee welfare benefit plan known as the Florida Dental Plan. Paul DiFranco was the vice-president of DVCC and a shareholder in Consultants and Administrators.

9. Between 1974 and 1977, defendant John Giardiello was the president and business agent of Laborers Local 767, and a trustee of the Florida Dental Plan; defendant Seymour Gopman was counsel to Laborers Local 767 and

to the Florida Dental Plan; defendant Bernard G. Rubin was the president of the Southeast Florida District Council of the Laborers Union, the president of Laborers Local 666, the business manager of Laborers Local 478, and a trustee of the Florida Dental Plan; and defendant Salvatore Tricario was the business manager and the recording secretary of Laborers Local 767.

10. During the same period, defendants Gopman and Rubin arranged for DVCC to make illegal kickbacks to them and to defendants Tricario and Giardiello in exchange for their support in obtaining union accounts for DVCC. The kickback payments, which amounted to approximately 15% of the gross payments to DVCC, were directed to the defendants through various corporate conduits.

11. The conduits included Fortune Services, Inc., and Ace Services, Inc., Florida corporations that were set up by defendant Seymour Gopman. Gopman was the 100% owner of Fortune Services, Inc., and Gopman's mother-in-law was the 100% owner of Ace Services, Inc. Gopman controlled both corporations. In addition, Sales Administrators for Employees Fringe Advantages, Inc., a New York corporation, served as a conduit for kickback payments to the defendants, as did Sage Corporation, and an associated joint venture known as the Drake Towers Joint Venture.

12. Between 1974 and 1977, DVCC and Dr. DiFranco made a total of $1,254,964.80 in illegal kickback payments to defendants Giardiello, Gopman, Rubin, and Tricario. These payments included $502,911.80 paid to Fortune Services, Inc.; $152,053 paid to Ace Services, Inc.; $425,000 paid to the Drake Towers Joint Venture; and $175,000 paid to Sales Administrators for Employees and Fringe Advantages, Inc.

13. The evidence at trial established that the total of $1,254,964.80 in kickback payments from DVCC and Dr. DiFranco was for the use and benefit of defendants Giardiello, Gopman, Rubin, and Tricario, and that the proceeds of these payments were shared by and distributed among these four defendants. However, the evidence did not reveal precisely how the kickbacks were apportioned, and thus how much of the $1,254,964.80 was actually received by each of the four defendants.

II. *Conclusions of Law*

On the basis of the Court's findings of fact and the arguments of counsel, the Court makes the following conclusions of law in support of the forfeiture order entered in this matter.

1. The federal racketeering statute provides that anyone who violates a provision of 18 U.S.C. 1962 "shall forfeit to the United States . . . any interest he has acquired or maintained in violation of section 1962." 18 U.S.C. 1963 (a)(1). The definition of "interest" in Section 1963(a)(1) includes the income, profits, or proceeds of a pattern of racketeering activity. *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982) (en banc) (Former Fifth Circuit case).

2. Upon proof that a defendant has violated Section 1962, forfeiture under Section 1963 is mandatory; forfeiture may not be denied as a matter of the Court's discretion. *United States v. L'Hoste*, 609 F.2d 796, 809-813 (5th Cir.), cert. denied, 449 U.S. 833 (1980).

3. Forfeitures under the RICO statute are *in personam*, not *in rem* forfeitures. *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980). Thus, it is not the item of property itself that is the subject of forfeiture; rather, the forfeiture runs to the individual who committed the offense in question.

4. The payments from Consultants and Administrators to Pinckard and Associates for the use and benefit of defendant Alfred Pilotto constitute income, profits, and proceeds obtained by Pilotto from a pattern of racketeering activity. This Court therefore shall declare the sum of $595,701.90 forfeited by defendant Pilotto to the United States, and shall enter judgment in favor of the United States against defendant Pilotto in that amount.

5. The payments from DVCC and Dr. DiFranco to Fortune Services, Inc., Ace Services, Inc., Sales Administrators for Employees Fringe Advantages, Inc., and the Drake Towers Joint Venture for the use and benefit of defendants John Giardiello, Seymour Gopman, Bernard G. Rubin, and Salvatore Tricario constitute income, profits, and proceeds obtained by those defendants from a pattern of racketeering activity.

6. Because the evidence at trial showed that the defendants Giardiello, Gopman, Rubin, and Tricario received the kickback payments of $1,254,964.80, there is no question that under the authority of *United States v. Martino, supra,* that sum is forfeitable to the United States. However, because the evidence failed to reveal how the $1,254,964.80 was apportioned among the four defendants to whom the money was paid, the Court must now determine how liability should be imposed in the orders of forfeiture against each of the defendants.

7. The defendants argue that because the evidence failed to show how the illegal kickback payments were apportioned among them, forfeiture should be denied against any of them in any amount. This argument, if accepted, would result in an enormous windfall to these defendants as well as to defendants in any case in which the defendants manage to keep secret the method of apportionment of their racketeering proceeds.

Reduced to its simplest form, the defendants' theory would produce the following anomaly: if a drug dealer violates the racketeering statute through his drug dealing, his drug profits may be declared forfeited to the government. But if two drug dealers violate the racketeering statute through their joint drug sales, the court could not forfeit the proceeds of their drug business, under the defendants' theory, unless the evidence clearly showed precisely how those proceeds were apportioned between them. This example, and similar cases, are not at all unlikely to arise. The manner of apportionment of ill-gotten gains is usually a matter to which only the wrongdoers are privy, and joint activity is, of course, very common in racketeering cases. Under the defendants' theory, forfeiture of the profits of joint racketeering activity would ordinarily be possible only if the defendants were careless enough to keep records of the apportionment of their illegal profits, or if the government were lucky enough to have an "insider" as a government witness.

8. The government argues that defendants Giardiello, Gopman, Rubin, and Tricario should be jointly and severally liable for the $1,254,964.80 that was paid to them, and that in the absence of evidence of how that sum was apportioned among them, judgments of the full amount should be entered against each. The government points out that the evidence showed, and the jury's verdict established, that these four defendants were co-conspirators and that they acted in concert in obtaining and receiving the illegal kickback payments. Under these circumstances, the government argues, the Court should look to analogous principles of tort and agency law and should impose joint and several liability on the defendants for the full sum. For the reasons given below, the Court adopts this view and will impose a judgment of $1,254,964.80 on each

of the four defendants—Giardiello, Gopman, Rubin, and Tricario.

9. To impose joint and several liability on the defendants in this case does not in any way violate the principles of forfeiture under the racketeering statute. As the court of appeals observed in *Martino*, Congress decreed that the RICO statute was to be "liberally construed to effectuate its remedial purposes," 681 F.2d at 956, n.16, quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452 § 904(a), 84 Stat. 947 (1970). Among the chief remedial purposes of the legislation, as noted by the court in *Martino*, was to deprive organized crime of the power it obtains from illegal endeavors and to make an attack on the source of its economic power. 681 F.2d at 956-957. To permit the defendants in this case to retain their ill-gotten gains simply because they have not revealed, and the government has not discovered, precisely how they apportioned those gains among themselves would hardly be consistent with the "liberal construction" directive given by Congress. Rather, the defendants' proposed approach would substantially impair the effectiveness of the RICO forfeiture remedy in "tak[ing] the profit out of organized crime." *United States v. Martino, supra*, 681 F.2d at 957.

10. Principles of tort and agency law support the imposition of joint and several liability in this case. In tort law, joint tortfeasors do not escape liability altogether simply because the degree of fault cannot readily be apportioned among them. Rather, in such cases, the joint tortfeasors are held jointly and severally liable for the loss. See, *e.g.*, *Foshee v. Lloyds, New York*, 643 F.2d 1162, 1167 (5th Cir. 1982); *Ross v. United States*, 640 F.2d 511, 521 (5th Cir. 1982); *Smith v. Fiat-Roosevelt Motors, Inc.*, 556 F.2d 728, 729 (5th Cir. 1977). In the absence of a ra-

tional basis for apportionment, the plaintiff may look to any one of the joint tortfeasors for payment of the entire judgment. See *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 773 (5th Cir. 1976); *Wm. G. Roe & Co. v. Armour & Co.*, 414 F.2d 862, 870 (5th Cir. 1969). The same rule applies when the action is one for an accounting of profits earned as a result of the improper conduct. See *Schein v. Chasen*, 478 F.2d 817, 824 (2d Cir. 1973), vacated and remanded on other grounds sub nom. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). There is no justification for reaching a different result in the case of forfeiture, which is designed to serve the interest of punishment as well as the interest of reversing the defendants' unjust enrichment.

An example may serve to make this point clear. If three operators of a mail fraud scheme were sued civilly by their victims, the three would be held jointly and severally liable for the loss suffered, at least in the absence of some basis for apportioning liability among them. For the same reasons, if the three defendants were prosecuted under RICO and the evidence failed to show how they divided the victims' funds among them, the defendants should be held jointly and severally liable on the forfeiture. The principle of joint and several liability is not regarded as unduly harsh as a means of implementing the tort judgment; there is no reason that it should seem any more inappropriate as applied to the judgment of forfeiture.

Likewise, agency principles have long been applied in the criminal law area to impose vicarious liability for the criminal conduct of others. Because each co-conspirator is deemed to be the agent of every other co-conspirator, all co-conspirators may be convicted for the foreseeable substantive offenses committed by any one of them, regardless of the degree of involvement of each co-conspira-

tor in those substantive offenses. See *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Michel*, 588 F.2d 986, 999 (5th Cir.), cert. denied, 444 U.S. 825 (1979); *United States v. Sullivan*, 578 F.2d 121, 122-123 (5th Cir. 1978). Thus, joint participation in a criminal venture can make each defendant liable for every crime committed pursuant to the criminal agreement, even if a particular defendant took no part in a particular substantive offense. The same principle permits the entry of a judgment of forfeiture against each defendant for the illegal profits earned by the joint venture of which that defendant was a part.

11. The defendants rely on the decision of the Fourth Circuit in *United States v. Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830 (1980). That case, however, does not discuss the question presented here, and it does not suggest that imposing joint and several liability for the forfeiture judgment would be improper. The court in that case simply pointed out that because the interests subject to forfeiture under RICO are interests connected with the offense, the RICO *in personam* forfeiture does not run afoul of the prohibition against corruption of blood or forfeiture in Article III, Section 3, of the Constitution.

12. Because the evidence at trial showed that defendants Giardiello, Gopman, Rubin, and Tricario acted in concert in obtaining and receiving the kickback payments from DVCC and Dr. DiFranco, those payments must be held to have been jointly obtained and received by the four defendants. In the absence of evidence indicating how the payments were allocated among the defendants, the entire sum is therefore properly viewed as the "interest" that each defendant "has acquired or maintained in violation of section 1962." While the United States, of course, cannot collect more than the total forfeitable sum of

$1,254,964.80, it should not be deprived of that forfeiture because the evidence fails to show how the jointly held sum was allocated among the defendants for their separate benefit. Thus, under the authority of 18 U.S.C. 1963 (a)(1), an order of forfeiture shall be entered against each of the four defendants and in favor of the United States for the entire sum received by the defendants from DVCC and Dr. DiFranco.

IT IS THEREFORE ORDERED AND ADJUDGED that pursuant to Count One of the indictment, the interest acquired and maintained by defendant Alfred Pilotto in violation of 18 U.S.C. 1962, to wit, $595,701.90, be and hereby is forfeited to the United States of America;

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to Count One of the indictment, the interest acquired and maintained by defendant John Giardiello in violation of 18 U.S.C. 1962, to wit, $1,254,964.80, be and hereby is forfeited to the United States of America;

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to Count One of the indictment, the interest acquired and maintained by defendant Seymour Gopman in violation of 18 U.S.C. 1962, to wit, $1,254,964.80, be and hereby is forfeited to the United States of America;

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to Count One of the indictment, the interest acquired and maintained by defendant Bernard G. Rubin in violation of 18 U.S.C. 1962, to wit, $1,254,964.80, be and hereby is forfeited to the United States of America;

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to Count One of the indictment, the interest acquired and maintained by defendant Salvatore Tricario in violation of 18 U.S.C. 1962, to wit, $1,254,964.80, be and hereby is forfeited to the United States of America.

DONE AND ORDERED in chambers at Miami, Florida, this 23rd day of December, 1982.

/s/ James W. Kehoe
United States District Judge

Copies Furnished to:
All counsel of record

APPENDIX E

18 U.S.C. 1963(c)

RICO Forfeiture Provisions

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)